it necessary for the prosecution to produce evidence for the jury to weigh if it would make a case for their consideration at all.

The rule of the presumption under consideration operates only in the absence of evidence opposed to the required conclusion. Where there is such opposing evidence the law ceases to demand the conclusion. The presumption must then disappear and the contested fact must be determined upon the evidence submitted. *State* v. *Quigley,* 26 R. I. 263.

Though the presumption under such circumstances disappears, the *facts* to which the presumption attaches still remain in the case. Their natural probative value is to be considered. Usually that probative value will be considerable, else the law would not have raised the presumption.

The fallacy of the line of reasoning adopted in the case under discussion was so clearly pointed out by the late Professor Thayer in his address before the Yale Law School, with the case of *Coffin* v. *United States,* 156 U. S. 432, as a text, that little can be added. See THAYER'S PRELIMINARY EVIDEKCE AT THE COMMON LAW, 551. It is interesting to compare *Holt* v. *United States,* 218 U. S. 245, 253, with the opinion in the *Coffin* case. The court still seems to be of the same opinion as to what is the law, but thinks it law the jury will not be likely to understand and that it is better not to let them try. See also in this same connection the earlier opinion in *Agnew* v. *United States,* 165 U. S. 36, rendered shortly after the publication of the address of Pro fessor Thayer above referred to. Citation to some of the later cases follows.

In accord with the case under discussion, *Grantham* v. *Ordway,* —— Cal. ——, 182 Pac. 73; *Cowdry's Will,* 77 Vt. 359. *Contra, Duggan* v. *Bay State Ry.,* 230 Mass. 370 ("The presumption of due care is not itself evidence. It is a simple rule to which resort is had when there is a failure of evidence; it is not evidence, but a rule about evidence"); *Frank* v. *Wright,* 140 Tenn. 535; *Keliher* v. *United States,* 193 Fed. 8, 23. A unique doctrine is that announced in the opinion in *Kauffman* v. *Logan,* —— Iowa, ——, 174 N. W. 366, where the court says that where there is a conflict in the evidence over the existence of a particular fact, such as that it is equally balanced between the parties, that the jury should find the fact established in accordance with the presumption, if one has been operative in the case. In other words, assuming that the burden of proof upon the question of whether the fact exists is upon the party in whose favor the presumption exists, then the jury should be told that they must find for him, even though it cannot say that the preponderance of the evidence is with him. A statement which seems to refute itself.

V. H. L.

PRIVILEGED COMMUNICATION BETWEEN ATTORNEY AND CLIENT—QUESTION OF WHETHER THE RELATION EXISTS LEFT TO JURY—PARTY ALLOWED TO ASSIGN ERROR ON RULING VIOLATING THE PRIVILEGE.—This procedure was justified in the opinion in *State* v. *Snook* (Court of Errors and Appeals of N. J., 1920), 109 Atl. 289. Snook was on trial for manslaughter charged as having been committed by the reckless driving of an automobile. After the act, Mimmick,

one of the persons in the automobile, and afterward a witness for the defense, went to an attorney and had some conversation with him, the substance of which, as testified to by the attorney, was a recital by M. of what had occurred and an inquiry by him of the attorney as to what he should do. In answer, he was advised to go to the police station and tell a truthful story, and told that he did not need an attorney. M. offered to pay him, but was told that there was no charge. The attorney further testified that he did not consider himself as retained.

The trial court held that the relation of attorney and client did not exist, and that even if it did M. was the only person who could assert the privilege growing out of it. The Supreme Court, where the case was next heard, held that the question of whether the relation existed was one of fact and for the jury. The Court of Errors and Appeal held that whether it was a pure question of fact or a mixed question of law and fact, it was the sole province of the court, as distinguished from the jury, finally to decide it. This court further held that the undisputed evidence showed the relation to exist.

There is no doubt but that at one time it was the uniformly recognized rule that all questions of admissibility were for the court finally to determine. Nor did it matter that such questions must be determined upon contested facts. *Bartlett* v. *Smith,* 11 M. & W. 483; *Burton* v. *State,* 107 Ala. 108; *People* v. *Kraft,* 148 N. Y. 631; *Com.* v. *Robinson,* 146 Mass. 571; *Donnelly* v. *State,* 26 N. J. L. 463, are illustrative cases.

On the other hand, there is abundance of authority now for the practice which allows the trial court to pass tentatively upon the evidence bearing upon whether the relation does exist which would make the communication confidential, allowing the evidence of the existence of the relationship, and that of what the communication was, to go to the jury for their finding, the communication to be considered if the jury finds the relationship did not exist, and to be disregarded if it is found to have existed. The following cases are examples of the application of this growing modern practice: *Hartford Fire Ins. Co.* v. *Reynolds,* 36 Mich. 502; *Robinson* v. *State,* 130 Ga. 361; *State* v. *Phillips,* 118 Ia. 660; *State* v. *Doris,* 51 Ore. 136.

The other important question discussed by the court was that of whether the party against whom such a communication is erroneously admitted can raise the question of privilege and assign error on the ruling of the court admitting it.

In the case under discussion the question was raised under these circumstances: M., the client (as claimed by the defendant), was being examined by the State's attorney. He had stated that he had a conversation with the person claimed by the defendant to have been his attorney, and the objection was interposed by defendant that the matter was privileged. Further examination was had to determine whether the relation of attorney and client existed, after which the court held that it did not exist, "and even if it existed M. was the only person who could claim the privilege." The defendant was allowed an exception to the ruling. Later the State called the attorney to contradict M. in respect to some portions of his testimony as to what was

said in the conversation with him, the attorney. Objection was made to this testimony by the defendant upon the ground that it was violating the privilege of M. to allow it. This was again overruled and an exception allowed.

The theory of the defendant's position was that the rule of privilege for communications between attorney and client was founded in public policy, and the maintenance of that public policy required the recognition of the right in the *party* to take advantage of an erroneous ruling admitting the communication.

The Court of Errors holds that, because it is a rule of public policy, its violation is not to be disregarded, regardless of whether such violation is prejudicial to the *party* making the objection. That a contrary rule would result in the legal protection, which the law assumes to give to confidential communications, being of no practical effect.

It may be said, as indeed it has been more than once, that the privileged witness may refuse to answer, and thus compel a respecting of his privilege. He may refuse to answer, but to do so is to assume a large measure of responsibility for a layman, particularly if, as held in *Doe* v. *Egremont,* 2 Moo. & Rob. 386, he is not entitled to the assistance of counsel in presenting his claim. Certainly, if there is any other way of securing respect for his privilege which does not involve defiance of the order of the court, it is much better that it be followed.

But another fact is not to be overlooked. In many cases where the question of privilege arises, the person entitled is not before the court, but its violation is attempted through another, whereas in others the person entitled must be the witness, as in cases involving the matter of self-crimination. The claim of privilege for communications between attorney and client is an illustration of the former. Much legal discussion fails to differentiate these cases. So clear a thinker as Professor Wigmore has not too well pointed this distinction. In his general discussion of the question of who may claim the privilege, he tells us of the proper procedure where the client is the witness, but does not help us much where the attorney is the witness. He says: "The only interest injured is that of the witness himself, who has been forced to comply with a supposed duty which, as between himself and the State, did not exist; his remedy was to refuse to obey and appeal for vindication if the court had attempted improperly to use compulsory process of contempt. But the opposite view naturally possesses attraction for those courts—and they are in the majority—who cannot evade the Anglo-Norman instinct to look upon litigation as a legalized sport, of orthodox respectability, with high stakes, the game to be conducted according to strict rules, under judicial supervision, and to be won or lost according as these rules are observed or disregarded." WIGMORE ON EVIDENCE, § 2196. Assuming that the attorney with whom the client had his relation as such is the witness, and the client is not before the court, is Professor Wigmore's suggested procedure practical? As would be his duty, the attorney objects to the request to disclose, but his claim of privilege for the communication is overruled. Is there not danger that some poorly nourished, anemic attorney may look upon the

vicarious sacrifice of his liberty in the interest of a client, now dead or lost, or both, it may be, and to whom he may have contributed his fee, as a bit too serious, and permit the court to coerce the disclosure, rather than to be forced to contemplate his high-mindedness in such narrow isolation as would probably await him if he did otherwise? Is he not quite likely to be of the opinion that the better way is to permit the party to pursue his "legalized sport" and have his exception?

The cases upon the general question are very well gathered in the notes to § 2196 of WIGMORE ON EVIDENCE, above noticed, and to the other sections there referred to. Space forbids extended analysis of the cases, but it may be noted that those cited by Professor Wigmore, with few exceptions, present the question where the person whose privilege is involved is the witness, or where there was held to be a waiver of the privilege shown by the testimony.

With regard to such cases, it will be borne in mind that the law has no prohibition against asking a witness for a disclosure of that which he is privileged as well to make as to withhold. It follows that, though a party may be entitled to take advantage of an erroneous ruling compelling disclosure, he has no right to object to the request for disclosure.

To summarize: (a) Under no circumstances should there be recognized a claimed right in a party to assign error on a ruling permitting a party to request the disclosure of a confidential communication between attorney and client. (b) Though the client-witness whose privilege is involved may know that he has a right to defy the court, go to jail, and, it may be, so effectuate his privilege, it is more often the case that he does not appreciate that he has such a right, and in any event the ruling of the court directing disclosure is really coercive, and he will usually disclose rather than be ordered to jail. The privilege under such circumstances is of no real value. (c) To attempt so to coerce a disclosure from the attorney is much more unreasonable. His interest is purely professional, and can scarcely be said to be unprofessional if he obeys the order of the court to disclose. (d) The only other practical way of protecting the privilege is that which puts the party who insists upon disclosure in the position where he imperils his case if he does so without legal right.

It will not be overlooked that the question is radically different where the court erroneously recognizes a privilege and excludes evidence admissible because there is none in law. In such case the party has been deprived of evidence to which the law entitled him, while in the other case evidence has been received against a party the admissibility of which depended upon the will of another over whom the party had no control.

In accord with the case under discussion may be cited: *State* v. *Barrows*, 52 Conn. 323; *Bacon* v. *Frisbie*, 80 N. Y. 394; *Stinson* v. *State*, —— Fla. ——, 80 So. 506. *Contra*: *Dowie's Estate*, 135 Pa. St. 210; *Matthews* v. *McNeill*, 98 Kan. 5; *Hauk* v. *State*, 148 Ind. 238, 260. V. H. L.